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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

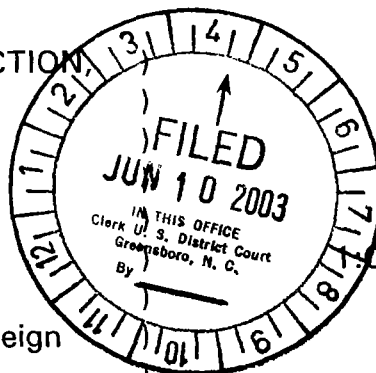
LEE ELECTRICAL CONSTRUCTION
INC.,

Plaintiff,

v.

EAGLE ELECTRIC, LLC, a Foreign
Corporation,

Defendants.



03CV00065

MEMORANDUM OPINION

TILLEY, Chief Judge.

This matter is now before the Court on Plaintiff's Motion to Remand to the Superior Court of Moore County, North Carolina [Doc. # 5]. For the reasons set forth below, the Plaintiff's Motion is DENIED.

I.

Plaintiff, Lee Electrical Corporation, Inc. ("Lee") filed an action against Eagle Electric, LLC ("Eagle") in the Superior Court of Moore County, North Carolina. The Complaint in the action asserts state law claims for breach of contract, quantum meruit and unfair and deceptive trade practices. Lee, in its prayer for relief, seeks damages in excess of \$10,000 for breach of contract, and in the alternative, \$26,465 for quantum meruit. In addition, Lee seeks an amount in excess of \$10,000 for unfair and deceptive trade practices. The text of the Complaint states that Lee is seeking treble damages, but the prayer for relief does not seek treble

damages. The Complaint was served on Eagle on November 21, 2002. On January 7, 2003, prior to filing its answer, Eagle served Lee with a Request for Statement of Monetary Relief Sought pursuant to Rule 8(a)(2) of the North Carolina Rules of Civil Procedure. On January 10, 2003, Lee responded that it “demands monetary relief in the amount of Thirty-Seven Thousand Two Hundred Fifteen and 00/100 Dollars (\$37,215) exclusive of lost profits that have not yet been calculated and treble damages that may be awarded pursuant to plaintiff’s unfair and deceptive trade practices claim.” On January 16, 2003, Eagle filed a Notice of Removal.

Lee argues that this matter must be remanded because Eagle failed to file a Notice of Removal within thirty days after the receipt of Lee’s initial pleading, the Complaint in this case. Eagle asserts that, although it did not file the Notice of Removal within thirty days of the Complaint, it filed the Notice within thirty days from the time at which it could be ascertained that the case was removable. Eagle argues that it became aware that the case was removable after Lee’s response to the Request for Statement of Monetary Relief Sought and filed a Notice of Removal within the thirty days of Lee’s response to the Request.

II.

A federal district court has jurisdiction over civil actions when there is diversity among the parties and the matter in controversy exceeds \$75,000.00. 28 U.S.C. § 1332. Section 1446 provides for removal of a state action by a

defendant to federal court if the matter could have properly been brought by the plaintiff in federal court. 28 U.S.C. § 1441(a). A defendant removes a case to federal court by providing a notice of removal in federal court. 28 U.S.C. § 1446.

Section 1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446 (2003).

In Lovern v. General Motors Corporation, 121 F.3d 160 (4th Cir. 1997), the Fourth Circuit stated that notice of removal is proper in a diversity case when it is apparent from “the four corners” of the pleading that the plaintiff is seeking damages in excess of the minimal jurisdictional amount of the federal court. Id. at 163; see also St. Paul Mercery Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938). In Lovern, the Fourth Circuit rejected the argument that a defendant was required to perform due diligence to determine how much the plaintiff was seeking in damages, but instead places the burden on the plaintiff to state damages. Id.; see also Chapman v. Powermatic, Inc., 969 F.2d 160, 163 (5th Cir.

1992). The Fourth Circuit reasoned that placing the burden on the defendant to determine the damages within a thirty day period would inject uncertainty into a court's inquiry, forcing a court to determine what a defendant knew at the time of the initial pleading and what the defendant would have known if it exercised due diligence. Chapman, 969 F.2d at 163. Therefore, the pleading must reveal "affirmatively on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount." Id.¹

In addition, in Lovern, the Fourth Circuit further stated that placing the burden for stating the amount of controversy on the plaintiff was in keeping with Rule 11. 121 F.3d at 162-63. If a defendant was required to file notice of removal within 30 days after service of the initial pleading no matter what information regarding damages the plaintiff placed in the pleading, the defendant would be faced either with Rule 11 sanctions for noticing removal without making an adequate inquiry or forgoing removal altogether. Id. at 163. The statute was not intended to place a defendant in this dilemma. Id.

As a result, the issue in this case is whether or not Eagle could tell from the face of the Complaint that Lee was claiming damages in excess of \$75,000. The

¹Usually, the party seeking to invoke the jurisdiction of the federal courts has the burden of proving its existence by showing that it does not appear to a legal certainty that the claim is for less than the jurisdictional amount. St. Paul, 303 U.S. at 289. However, in determining whether or not a defendant removed an action in a timely manner, the inquiry is who has the initial burden when the amount in controversy is not plain from the face of the plaintiff's complaint.

Complaint in this case was originally filed in Moore County, North Carolina, therefore the North Carolina Rules of Civil Procedure apply to the original complaints. North Carolina Rule of Civil Procedure 8(a)(2) requires that claims for relief include a demand for relief. N.C.R.C.P. 8(a)(2) (West Supp. 2002). However, the rule does not require a plaintiff to state an exact monetary amount in his demand for judgment in order to satisfy the pleading requirements. Id.; see also Hoffman v. Vulcan Materials Co., 19 F.Supp.2d 475, 478 n. 3 (M.D.N.C. 1998). As a result a plaintiff can plead for judgment in excess of a certain dollar amount, like in this case, making it difficult to determine the exact amount in controversy in case. 14C Charles Alan Wright, et al., Federal Practice and Procedure § 3725 at 79 (3d. 1998). Rule 8 also allows a defendant to request, at any time, a written statement of the relief sought, and the plaintiff must provide a statement of the relief within 30 days of the request. Id.

In this case, the Complaint states in the prayer for relief that the amount in controversy is: (1) in excess of \$10,000.00 for breach of contract, including loss of profits; (2) in the alternative, \$26,465.00 for quantum meruit; and (3) in excess of \$10,000.00 for unfair and deceptive trade practices.² Lee also points to

²It is not clear from the complaint whether or not the same course of conduct gives rise to the claim for breach of contract and unfair and deceptive trade practices. In Marshall v. Miller, 47 N.C.App. 530, 542, 268 S.E.2d 97, 103 (1980), modified and affirmed, 302 N.C. 539, 276 S.E.2d 397 (1981), the court held that where the same course of conduct gives rise to a traditionally recognized action such as breach of contract as well as a cause of action for unfair trade practices, damages may be recovered for either breach of contract or unfair trade

paragraph 15 and paragraph 32 of the Complaint. Paragraph 15 of the Complaint describes a demand letter sent to Eagle before this action was filed accusing it of terminating the contract and detailing Lee's losses. Paragraph 32 requests that damages for unfair and deceptive trade practices be trebled.

From the face the complaint, all that can be determined is that Lee is either seeking damages in excess of \$40,000.00³ if damages for unfair and deceptive trade practices are trebled or in the alternative, damages in excess of \$56,465.00 if again unfair and deceptive trade practices are trebled. Lee argues that the damages can be determined by the demand letter referenced in Paragraph 15 of the complaint. To support this proposition, Lee cites Marler v. Amoco Oil Co., Inc., 793 F.Supp. 656, 658-9 (E.D.N.C. 1992), which states that the Complaint and demand letter provided the necessary information to determine the amount in controversy.

However, Marler, was decided prior to the Fourth Circuit's decision in Lovern and used the reasoning rejected in Lovern. Instead, the amount of controversy is

practices, but not both. However, that rule is not always controlling where a plaintiff's claim for unfair trade practices is based on a course of conduct separate from the breach of contract. Britt v. Jones, 123 N.C. App. 108, 112, 472 S.E.2d 199, 201 (1996). It is unclear what analysis would apply to the causes of action in this case.

³This figure is: in excess of \$10,000.00 for breach of contract plus in excess of \$10,000.00 for unfair and deceptive trade practices trebled for a total of in excess of \$40,000.00. The alternative figure uses the same calculation, but substitutes the quantum merit amount for the breach of contract amount.

determined within the four corners of the complaint. Lovern, 121 F.3d at 163

Although the demand letter and the amount it requested is referenced in the factual allegations of the Complaint, it is not referred to either in the claim for relief or in the prayer for relief. It is not clear if the amount demanded in the demand letter is the same amount requested in the demand for relief, or if the amount has changed since the suit was filed. Requiring further inquiry by Eagle would be placing the burden on Eagle, the defendant, to determine the damages. As a result it is not clear from the face of the complaint that this action was properly removable because the amount in controversy is not clear. See also Hoffman, 19 F.Supp.2d at 479 (stating that it was not clear from the face of the complaint that the action was removable where a plaintiff plead that his damages exceeded \$30,000.00).

Eagle filed a timely Request for Statement of Monetary Relief Sought. In response, Lee stated that it was seeking monetary relief in the amount of \$37,215.00, exclusive of lost profits that had not been calculated, and treble damages. The response is considered an "other paper" for purpose of §1446(b). Eagle interpreted the response to include the claim for unfair and deceptive trade practices. As a result, a possible award of treble damages would satisfy the amount in controversy requirement. Based on the new response to the Request for Statement of Monetary Relief, Eagle sought to remove the case to federal court within the 30 day period allowed under the second paragraph of § 1446(b).

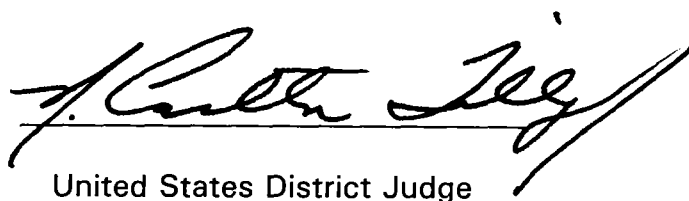
Lee argues that the response to Eagle's Request for Statement of Monetary

Relief Sought simply restated what was in the Complaint and its attachments, specifically Lee's demand letter to Eagle. Again, Lee's argument fails to show how the amount in the demand letter was included in the Complaint's demand for relief. While the letter is referred to in the Complaint it is not specifically addressed in the prayer for relief. It was not until Lee's response to the Request for Statement of Money damages that the amount was discussed within the context of a prayer for relief eliminating any burden on Eagle to determine the amount of damages in the action. North Carolina Rules of Civil Procedure Rule 8 allows a party to clarify the request for money demand because of the structure allowed in pleading damages in the state.

III.

In conclusion, Lee's Motion to Remand based on failure to comply with the 30 day time period of § 1446 is DENIED.

This, the 18th day of June, 2003.


United States District Judge